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No. 424

FILED
OCT 26 1949
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1949.

INTERSTATE EQUIPMENT CORPORATION,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, THE HONORABLE GUY L. FAKE, THE CHIEF JUDGE THEREOF, and HARTFORD ACCIDENT & INDEMNITY COMPANY, to the respective and individual use of Esther F. and Earl C. Silva, George W. Johnson, Henry K. Plemer and Hiram John,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No.

Supreme Court of the United States

October Term, 1949.

Interstate Equipment Corporation,
Petitioner,

vs.

United States District Court for the District of New Jersey, the Honorable Guy L. Fake, the Chief Judge Thereof, and Hartford Accident & Indemnity Company, to the respective and individual use of Esther F. and Earl C. Silva, George W. Johnson, Henry K. Plemer and Hiram John,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, Interstate Equipment Corporation, of New York, appealed to the court below to review directly two orders of the District Court for the District of New Jersey and also petitioned the court below to review those orders by the issuance of a common law writ, in the event of a finding that the orders were not reviewable on direct appeal. Petitioner now respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered July 29, 1949 denying petitioner's application in that court for a writ of

certiorari, mandamus or prohibition. Concurrently with the filing of this petition, petitioner has filed a petition for a writ of certiorari to review the judgment of the court below of the same date dismissing the appeals taken by petitioner to that court.

Opinions Below.

The opinion of the Court of Appeals is reported in 176 F. 2d 419. The first opinion of the District Court is reported in 74 F. Supp. 791. The second opinion of the District Court is reported in 81 F. Supp. 357.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 29, 1949. The jurisdiction of this court is invoked under Title 28, United States Code, § 1254 (1).

Statute Involved.

Title 28, United States Code, § 1651 (a) (1948 Rev.) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

Question Presented.

If the orders of the District Court were not directly appealable, were they reviewable by a common law writ?

Statement.

Petitioner appealed to the Court of Appeals from two orders of the District Court granting a motion of respondent, Hartford Accident & Indemnity Company, permitting it to amend the process and complaints issued and filed in four actions commenced against "Interstate Equipment Corporation, a corporation of the State of New Jersey," so as to effect a *nunc pro tunc* substitution of petitioner, a New York corporation, as the sole party defendant after the local statute of limitations had run in petitioner's favor. Petitioner, who appeared specially in the District Court, argued that under the circumstances that court was bound by the Rules of Decision Act (Title 28, United States Code, § 1652) and decisions of this court to apply New Jersey law in the disposition of the motion to amend, and that, under local law, the motion must be denied.

As an alternative, and in the event of a holding by the Court of Appeals that the orders appealed from were not reviewable by direct appeal, petitioner applied for a rule to show cause why a common law writ should not issue to review the action of the District Court, which, it was argued, was erroneous and deprived petitioner of substantial rights.

The Court of Appeals, in a *per curiam* opinion which did not discuss the merits of petitioner's argument concerning the applicability of the principle of *Erie R. Co.* v. *Tompkins,* dismissed the appeals under the final judgment rule and, upon the same ground, denied petitioner a common law writ.

Concurrently with the filing of this petition, petitioner has filed a petition for a writ of certiorari to review the action of the Court of Appeals dismissing the appeals taken to that court. The background of the litigation is set forth in that petition, and, accordingly, this statement has been limited to the additional point raised by this petition.

Reasons Relied on for the Allowance of the Writ.

The action of the Court of Appeals in denying a common law writ on the ground stated is erroneous, is in apparent conflict with decisions of this court and of Courts of Appeals for other circuits, and decides an important question of federal law which should be definitely settled by this court.

ARGUMENT.

I.

If the orders of the District Court were not subject to direct appeal, they were reviewable by a common law writ.

It is not open to doubt that under Title 28, United States Code, § 1651 (a), the court below has power to issue common law writs in aid of its appellate jurisdiction. *Ex parte Peru*, 318 U. S. 578, 584 (1943); *McClellan* v. *Carland*, 217 U. S. 268, 279 (1910).

The Court of Appeals was of the view that the potential jurisdiction which it found to exist(1) was not sufficient to confer jurisdiction to issue a common law writ, and that a writ may not issue unless the order sought to be reviewed is an "appealable" order under Title 28, United States Code, § 1291. This is apparent from the reference in the court's opinion to its previous discussion relating to the dismissal of the appeals, which also were then before it, under the final judgment rule,(2) and is a reaffirmation of the opinion expressed previously by the same court in *Beneficial Industrial Loan Corp.* v. *Smith,* 170 F. 2d 44 (3rd Circ., 1948).(3) This view is erroneous.

First, ever since the decision of this court in *McClellan* v. *Carland, supra,* it has been settled that in a proper case the common law writs may be issued in aid of the court's *potential* appellate jurisdiction, before actual appellate jurisdiction has been obtained. In the *McClellan* case, this court said (217 U. S. at pp. 279-280):

> "In this case it appears that the original action commenced in the Circuit Court of the United States might have been taken on appeal to the Circuit Court of Appeals. * * * There are not wanting decisions in the Federal courts holding different views as to

(1) The opinion below states: "If the New York corporation is wrongly held in the suits that legal fact can be determined by appeals after trial on the merits in the court below." 176 F. 2d 419, 420.

(2) "What we have said disposes also of the motion for a rule to show cause on the petition of the New York corporation for a writ of certiorari, mandamus or prohibition. These extraordinary remedies may not be invoked in lieu of appeals." 176 F. 2d at pp. 719-720.

(3) "If the order of the court below is not appealable we would not have the right to issue the writ since insofar as the instant litigation is concerned this court would have no appellate jurisdiction to protect." 176 F. 2d at p. 50. On certiorari, this court, having upheld the appealability of the order there involved, dismissed the writ without discussing the validity of view so expressed by the Court of Appeals. *Cohen* v. *Beneficial Industrial Loan Corp,* U. S. , 93 L. ed. Adv. Op. 1221, 1226 (1949).

> the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdictions of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

Secondly, if review of an order by common law writ may be had only if such order is directly appealable, there would never be a need for the issuance of the writ and the court's jurisdiction to issue such a writ would for all practical purposes be abolished. See *In re Melekov*, 114 F. 2d 727 (C. C. A. 9th, 1940), where a writ of mandamus was denied on the sole ground that the order sought to be reviewed was appealable. This court has never imposed such a restriction upon the jurisdiction of the Courts of Appeals, and has on several occasions sanctioned the issuance of a writ where the action to be reviewed was interlocutory in the jurisdictional sense. The cases establishing the test of "potential" or "ultimate" jurisdiction, of which the *McClellan* case is illustrative, are examples. And see *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212 (1945).

II.

This case is an appropriate one for the exercise of the Court's power to issue a writ in aid of its jurisdiction.

The important question presented where a writ is sought in an action over which the court has ultimate appellate

jurisdiction is not whether the power to issue a writ exists but whether, under the circumstances of the case, such power should be exercised. *Semble, McClellan* v. *Carland,* 217 U. S. 268, 281 (1910); *Adams* v. *United States,* 317 U. S. 269, 273 (1942).

This case, it is submitted, is an appropriate one for the exercise of the court's power to issue a writ. It involves the failure of a District Court to apply an important principle of federal jurisdiction, resulting in an erroneous determination affecting substantial rights of petitioner and forcing petitioner to a trial on the merits of a tort action, after the statute of limitations had run in its favor and over seven years after the occurrence of the accident giving rise to the alleged claim. It involves, also, important questions relating to the personal jurisdiction of the District Court over petitioner and action of that court in asserting such jurisdiction.

(1) In the District Court, petitioner argued that the principle of *Erie R.* v. *Tompkins,* 304 U. S. 64 (1938), as further defined in *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945), applied in the disposition of the motion of respondent, Hartford Accident & Indemnity Company, to amend the process and complaints so as to project petitioner into the actions *nunc pro tunc* after the running of the local statute of limitations. In support, petitioner argued that under the New Jersey cases of *Coventry* v. *Barrington,* 117 N. J. L. 217, 187 Atl. 348 (E. & A., 1936), *Maitland* v. *Worthington,* 59 N. J. L. 114, 35 Atl. 759 (Sup. Ct., 1896), and *Peters* v. *Public Service Corp.,* 132 N. J. Eq. 500, 29 A. 2d 189 (Ch., 1942), affirmed 133 N. J. Eq. 283, 31 A. 2d 809 (E. & A., 1943), the motion would be denied, and petitioner

accorded its right of repose, if the actions had been pending under like circumstances in the state court. The District Court refused to consider the *Erie* doctrine and without discussion of that important principle of federal jurisdiction granted the motion to amend on what it considered to be broad equitable principles. It was to review this action, which is in apparent conflict with *Guaranty Trust Co.* v. *York*, that petitioner sought a writ in the Court of Appeals.

Apparently, the point raised here has never been determined by this court or by any Court of Appeals. But, it is submitted, that the failure of a District Court to consider the *Erie* doctrine in a proceeding before trial, where an application of local law would result in a termination of the litigation, constitutes action of such importance, which, if not directly appealable, should be reviewed immediately by the issuance of a writ. And since the *Erie* doctrine does involve a "policy of federal jurisdiction," *Guaranty Trust Co.* v. *York, supra,* authority is supplied by way of analogy to cases involving the exercise of jurisdiction by inferior courts. In *Ex parte Peru,* 318 U. S. 578, 583 (1943), this court stated:

> "The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so."

The allowance of a writ to review an erroneous determination made before trial of the applicability of the *Erie*

doctrine will strengthen the policy of that doctrine by providing a measure of supervision and will, in many instances, expedite the judicial settlement of disputes. The availability of such a review, for example, would have made a jury trial unnecessary in *Ragan* v. *Merchants Transfer & Warehouse Co.*, U. S. , 93 L. ed. Adv. Op. 1248 (1949). This court has held that saving the delay and expense of a trial is an element which justifies the issuance of a writ. *Ex parte Simons*, 247 U. S. 231 (1918); *Ex parte Peterson*, 253 U. S. 578 (1920); *In re Skinner & Eddy Corp.*, 265 U. S. 86 (1923).

(2) The special circumstances resulting from the action of the District Court also justify the immediate issuance of a common law writ. *Ex parte Fahey*, 332 U. S. 258 (1947), sanctions resort to a writ "where appeal is a clearly inadequate remedy." If the orders of the District Court cannot now be reviewed, petitioner will be forced into the defense of a complicated tort action over seven years after the occurrence of the actions and over five years after the statute of limitations had run in its favor. In addition, the action of the District Court is so framed as to deny petitioner the right to assert substantial defenses relating to personal jurisdiction. In *Ex parte Simons*, 247 U. S. 231, 239 (1918), Mr. Justice Holmes, in discussing the propriety of the issuance of a writ, stated:

> "If we are right, the order was wrong and deprived plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

See also, *In re Skinner & Eddy Corp.*, 265 U. S. 86, 96 (1923) ("It would be a useless waste of time and effort to enforce a trial in the court of claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated.").

III.

This Court should review the action of the Court of Appeals in denying petitioner a common law writ.

(1) The opinion below decides an important question of federal law and jurisdiction, and this court should determine the validity of that decision. The decision of the Court of Appeals attempts to relate the jurisdiction conferred by Title 28, United States Code, § 1651 (a), to the limitations imposed upon jurisdiction "of appeals" under Title 28, United States Code, § 1291. Before the revision of the Judicial Code, section 262 (36 Stat. 1162, 28 U. S. C., § 377) conferred upon the Circuit Courts jurisdiction to issue all common law writs "which may be necessary for the *exercise* of their respective jurisdictions." As revised, the Code now reads, "*in aid of* their respective jurisdictions." This change is not without significance, and indicates a broadening of jurisdiction and congressional acceptance of the test of potential or ultimate jurisdiction. For the first time since the 1948 revision of the Judicial Code, the question was presented to this court in *Cohen* v. *Beneficial Industrial Loan Corp.*, U. S. , 93 L. ed. Adv. Op. 1221 (1949), but was left unanswered. This court should now determine whether under the revised Judicial Code, an

order appealable under Section 1291 is necessary to confer jurisdiction to issue a writ under Section 1651 (a).

(2) If this petition is granted, petitioner will argue that the jurisdiction of the Court of Appeals was expanded by the revision of the Judicial Code in a manner consistent with prior court decisions which are still apposite. The decision below is in apparent conflict with those decisions, of which *McClellan* v. *Carland,* 217 U. S. 268 (1910), and *Ex parte United States,* 287 U. S. 241 (1932), are illustrative.

(3) The decision below is also in conflict with the following decisions of other Courts of Appeals, in none of which did the absence of an appealable order prevent the issuance of a writ:

In re Babcock, 26 F. 2d 153 (C. C. A. 7th, 1928) (mandamus may issue to require District Court judge to permit intervention);

Travelers' Protective Ass'n of America v. *Smith,* 71 F. 2d 511 (C. C. A. 4th, 1934) (order remanding case to state court not appealable, but mandamus may issue);

Whittel v. *Roche,* 88 F. 2d 366 (C. C. A. 9th, 1937) (mandamus granted to compel District Court to dismiss suit);

United States v. *Hall,* 145 F. 2d 781 (C. C. A. 9th, 1944) (mandamus issued to compel District Court judge to assume jurisdiction in a comdemnation case);

Bereslavsky v. *Caffey,* 161 F. 2d 499 (C. C. A. 2d, 1947) (mandamus granted directing District Court judge to vacate order striking out demand for jury trial in pending action);

Bereslavsky v. *Kloeb,* 162 F. 2d 862 (C. C. A. 6th, 1947) (mandamus issued directing District Court to vacate order striking previous order granting jury demand).

See also, *In re Melekov,* 114 F. 2d 727 (C. C. A. 9th, 1940) (mandamus denied on sole ground that order *was* appealable).

Compare, *Bank Line* v. *United States,* 163 F. 2d 133 (C. C. A., 1947).

Contra, United States v. *Raab,* 147 F. 2d 225 (C. C. A., 3rd, 1945);

In re Kilpatrick, 167 F. 2d 471 (C. C. A. 5th, 1948).

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals denying petitioner a common law writ should be granted.

CHARLES DANZIG,
Counsel for Petitioner.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, THE HONORABLE GUY L. FAKE, THE CHIEF JUDGE THEREOF, and HARTFORD ACCIDENT & INDEMNITY COMPANY, to the respective and individual use of Esther F. and Earl C. Silva, George W. Johnson, Henry K. Plemer and Hiram John,
Respondents.

On Petition for Writ of Certiorari

RESPONDENT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1949

No.

INTERSTATE EQUIPMENT CORPORATION,

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vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, THE HONORABLE GUY L. FAKE, THE CHIEF JUDGE THEREOF, and HARTFORD ACCIDENT & INDEMNITY COMPANY, to the respective and individual use of Esther F. and Earl C. Silva, George W. Johnson, Henry K. Plemer and Hiram John,

Respondents.

On Petition for Writ of Certiorari

RESPONDENT'S BRIEF.

ARGUMENT.

The Proceedings are Premature.

The orders of the District Court sought to be reviewed are not final decisions which may be reviewed pursuant to the authority of sec. 1291 of Title 28, U. S. C., nor are they of any of the classes of interlocutory orders appealable under sec. 1292 of that Title. The effect of these orders is to leave the actions still pending and undetermined with leave granted the present petitioner to file amended answers. Nor can mandamus or prohibition be availed

of to effect a review. In *Roche* v. *Evaporated Milk Association,* 319 U. S. 21 (1943), Chief Justice Stone said (at pp. 27-31):

> "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record. Ex parte Morgan, 114 U. S. 174, 175, 29 L. ed. 135, 136, 5 S. Ct. 825; Re Atlantic City R. Co., 164 U. S. 633, 635, 41 L. ed. 579, 580, 17 S. Ct. 208; Ex parte Roe, 234 U. S. 70, 73, 58 L. ed. 1217, 1218, 34 S. Ct. 722; Ex parte Park Square Auto. Station, 244 U. S. 412, 414, 61 L. ed. 1231, 1232, 37 S. Ct. 732; Ex parte Riddle, 255 U. S. 450, 451, 65 L. ed. 725, 726, 41 S. Ct. 370. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U. S. C. A., § 225 (a), 7 F. C. A. title 28, § 225 (a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgment should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. Cobbledick *v.* United States, 309 U. S. 323, 84 L. ed. 783, 60 S. Ct. 540. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect therefore of this mode of interposition would

be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment.' Bank of Columbia *v.* Sweeney, 1 Pet. (U. S.) 567, 569, 7 L. ed. 265, 266. See also Life & F. Ins. Co. *v.* Adams, 9 Pet. (U. S.) 573, 602, 9 L. ed. 234, 244; Ex parte Hoard, 105 U. S. 578, 579, 580, 26 L. ed. 1176, 1177; American Constr. Co. *v.* Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 S. Ct. 758.

For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252; Ex parte Roe, 234 U. S. 70, 58 L. ed. 1217, 34 S. Ct. 722, and Ex parte Park Square Auto. Station, 244 U. S. 412, 61 L. ed. 1231, 37 S. Ct. 732, supra. And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, Re Atlantic City R. Co., 164 U. S. 633, 41 L. ed. 579, 17 S. Ct. 208, supra; Re Chicago, R. I. & P. R. Co., 255 U. S. 273, 280, 65 L. ed. 631, 635, 41 S. Ct. 288; cf. Re New York & P. R. S. S. Co., 155 U. S. 523, 531, 39 L. ed. 246, 249, 15 S. Ct. 183, or denying a non-suit, Ex parte Loring, 94 U. S. 418, 24 L. ed. 165, despite the inconvenience to petitioner of being forced to proceed to trial in advance of a review of the court's action. Ex parte Whitney, 13 Pet. (U. S.) 404, 408, 10 L. ed. 221, 223; Ex parte Perry, 102 U. S. 183, 186, 26 L. ed. 43, 44. Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct."

In being required to go to trial and to await a final decision, this petitioner will be put to an inconvenience which certainly is not so great as that of the respondent in the case just cited.

The Court of Appeals quite properly dismissed the appeals before it and denied petitioner's application for mandamus or prohibition.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, should be denied.

Respectfully submitted,

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